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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 149.

CALDWELL SUGARS, INC., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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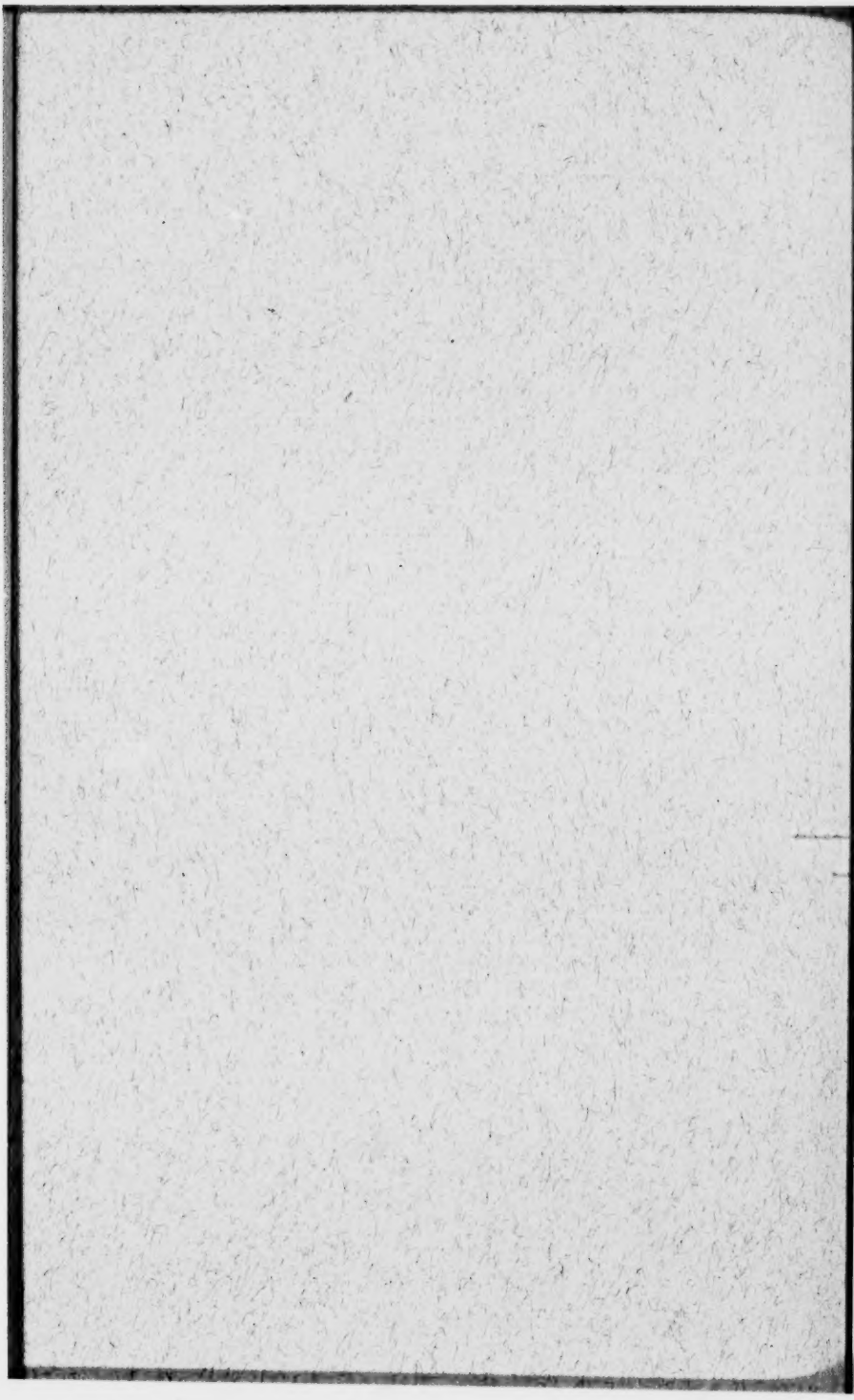

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justice of the Supreme Court of the United States:

Your Petitioner, Caldwell Sugars, Inc., a Louisiana corporation, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the foregoing cause. That Court's opinion was rendered on February 15, 1944; and the petition for rehearing was denied on March 13, 1944.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906 (g) as amended by Section 510(j) of the Revenue Act of 1942, printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Caldwell Sugars, Inc., herein for convenience called Caldwell, was a grower and processor of sugarcane, and during the period from June 8, 1934, through April 30, 1935, paid processing taxes totaling $28,663.55 under the Agricultural Adjustment Act of 1933 as amended. It filed claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue having disallowed this claim, petition was filed thereon with the United States Processing Tax Board of Review.

That Board heard the cause; but, before it made findings of fact and a decision, the said Board was abolished by Section 510 of the Revenue Act of 1942 and jurisdiction transferred to The Tax Court of the United States.

The Tax Court of the United States, without further hearing, made findings of fact and decided that your petitioner had not established that it bore the burden of the tax (R. 62). To The Tax Court, the instant case and *Slack Bros. Inc.* (on which certiorari is also being sought this day), were cases of first impression as the said Court had no previous experience under Title VII of the Revenue Act of 1936. From the decision of The Tax Court Caldwell filed a petition for review in the Circuit Court of Appeals for the Fifth Circuit pursuant to the Revenue Act of 1936, Title VII, Section 906(g).

The Tax Court made fact findings in substance as follows:

(a) that Caldwell was a grower and buyer of sugarcane, processing such sugarcane during a three months' period (October to December) each year, after which it closed its factory until the ensuing season (R. 53);

(b) that in 1933, due to the failure of its bank stockholder, it was unable to meet its payroll for four months; and, was able to buy only 33,226 tons of sugarcane compared to 66,153 tons the year before (R. 55);

(c) that from early spring 1933 to June 1934 conditions in the sugar industry were uncertain and confused finding a number of different factors that affected the price (R. 55-57);

(d) that on the effective date of the tax the general price level of refined sugar increased slightly more than the tax (R. 57); and that from mid-September 1933 to June 1, 1934 the price of sugar declined 60 cents; also that there was at least 50 percent more sugar available than could be consumed in a year (R. 56);

(e) that the tax period margin compared with the statutory base period margin was unfavorable to Caldwell (R. 57); also that a margin computation based on a comparison of the tax period with the 1936 crop would establish a margin favorable to Caldwell (R. 58);

(f) that the processing tax was not billed as a separate item of Caldwell's invoices except for $2,737.12 on seven invoices of 575,700 pounds of second raw sugar (R. 58);

(g) that the quota system of control remained in effect after the tax period (R. 57); and,

(h) that Caldwell marketed from 80 to 97 percent of its sugar between October and the following January or February (R. 54).

The foregoing fact findings by The Tax Court are the pertinent ones here. Important too, are facts that the Tax Court failed to find, namely:

(a) that Caldwell did no processing during the period six months after the tax (Stipulation, paragraph 1, R. 72);

(b) that the price of refined sugar during Caldwell's marketing season in the tax period was just about the same as the price during the preceding season (R. 72-73).

Caldwell filed a petition for review with the Circuit Court of Appeals for the Fifth Circuit on the grounds that Caldwell had rebutted the adverse margin by a showing that conditions were not comparable; had further shown that it bore the entire burden of the tax (excepting $2,737.12) by the price being the same during the tax period as during the preceding crop; and, that the 1936 crop under similar conditions (except the tax) showed a margin revealing that Caldwell bore the entire tax; and, therefore, the decision was not sustainable in law.

The Circuit Court affirmed the Tax Court on the ground that the adverse margin gave rise to a presumption that the tax burden had been shifted (R. 82) thereby conflicting with the rationale of *Webre Steib Co., Ltd.*, v. *Com.* (140 F. (2d) 768) decided by the same Court wherein it held that the statutory presumption was dissolved citing *Commissioner* v. *Bain Peanut Company* (134 Fed. (2d) 853). Likewise that the 1936 crop experience did not give rise to any presumption or "otherwise satisfy the burden of proof that rested upon" Caldwell (R. 83).

Caldwell's contentions are that the fact findings made by The Tax Court rebut the presumption created by the statutory margin test; that the findings The Tax Court made with respect to the 1936 crop do establish the actual extent to which Caldwell bore the burden of the tax; and, that the Court erred in failing to find from the evidence, stipulated in the record on appeal (R. 72-73), that the price during the tax period was the same as during the preceding year, and therefore, that Caldwell established that it bore the entire burden of the tax. Hence from Caldwell's viewpoint these are the

QUESTIONS PRESENTED.

1. What meaning and effect did Congress, in Section 907 of the Revenue Act of 1936, intend to give to the "prima facie evidence" arising from the comparison of the average margins computed as therein authorized?

2. Was the evidence submitted by Caldwell sufficient to rebut the prima facie showing made by the Commissioner under Section 907(a) of the Revenue Act of 1936?

3. Is the decision of The Tax Court, affirmed by the Circuit Court, sustainable in law when, as here, The Tax Court finds conditions in the base period dissimilar from those existing in the tax period; and, further finds that a comparison with the succeeding year indicates that Caldwell bore the entire burden of the tax?

4. Did The Tax Court, and the Circuit Court, neither of whom heard the case, but each reviewing a record, err in failing to find from the evidence that since Caldwell received no higher price during the tax period than it did during the preceding season, such evidence was relevant and established the ultimate fact that the tax was not passed on in the selling price?

REASONS FOR GRANTING THE WRIT.

1.

In construing Section 907 of the Revenue Act of 1936 the Circuit Court of Appeals decided in one day three cases to wit: *Webre Steib Company Ltd., Slack Bros. Inc.* and the instant case. Certiorari is sought in all three cases. In *Webre Steib* the presumption was in favor of the taxpayer and the Court held the presumption dissolved on the evidence advanced by the Commissioner. In the instant case and *Slack Bros. Inc.* the Court proceeded on the presumption in spite of fact findings establishing that the presumption was rebutted. In *Webre Steib* the Court followed its analysis of the presumption in *Commissioner* v. *Bain Pea-*

nut Company (134 F. (2) 853). This Court granted certiorari in *Bain Peanut Company of Texas* v. *Commissioner* (320 U. S. 721). However, this Court did not decide the question as the petition was dismissed on motion of the *Bain Peanut Company* on March 6, 1944. The question is more important now, than it was when this Court granted certiorari in the *Bain* case (*supra*) as the said Circuit Court of Appeals continues to follow the *Bain* case at times and not in others (see also *Byars* v. *Commissioner*, 138 F. 2d 513 at 514).

2.

The importance of the question is readily apparent from an examination of Title VII of which Section 907 is a part (see appendix). This Title prescribes an exclusive method of obtaining refunds of processing taxes paid under the unconstitutional provisions of the Agricultural Adjustment Act of 1933: *Anniston Manufacturing Company* v. *Davis* (301 U. S. 337). Claims for refund were easily known to be so numerous and important that Congress in Section 906 felt impelled to establish a special agency, the Processing Tax Board of Review, to hear and pass upon refund claims exclusively. This case was heard by the Processing Tax Board. However, before it made findings and a decision jurisdiction was transferred to The Tax Court—a Court with no previous experience at all on the complex subject. The instant case and the *Slack Bros. Inc.* case decided the same day are the first cases of this type that The Tax Court decided, and it did so without having heard the evidence or listened to oral argument. At the heart of every claim is the comparison of average margins for the tax period and the period before and after the tax; no claimant can get his claim considered without presenting this prescribed margin computation or without having the margin computation invoked against him. It is obviously important to all taxpayers having refund claims now to know whether the prima facie evidence or the presumption established by

Subsection (a) of Section 907 is to disappear wholly and be completely dissolved when any substantial rebutting evidence is produced, or, as Subsection (c) would seem to indicate, must it be rebutted "by proof of the actual extent to which the claimant shifted to others the burden of the processing tax"—and, what constitutes proof of the actual extent?

3.

Furthermore, in the present case—as in the *Slack* case filed this day—the Fifth Circuit Court of Appeals has rendered decisions in conflict with other Circuit Court of Appeals on the same state of facts. We refer to *Helvering* v. *Insular Sugar Refining Co.* (not yet reported, but appearing in Commerce Clearing House 1944 Federal Tax Service, paragraph 9260) decided by the United States Court of Appeals for the District of Columbia on March 27, 1944. That was a sugar processing case too. There the Processing Tax Board found for the taxpayer and the appellate Court affirmed. Here The Tax Court held against the taxpayer and the Fifth Circuit affirmed.

There, as here, there was a price increase on the effective date of the tax in an amount slightly in excess of the tax. There, as here, the taxpayer was not in the market for some months after the tax was inaugurated. There, as here, the price at the time of marketing was about the same as during the same period of the preceding year. There, as here, the price after the tax was invalidated was higher than during the tax period. There, as here, the taxpayer had no part in making or controlling the current market. There, the Court of Appeals for the District of Columbia held that such factors did not destroy the presumption favorable to the taxpayer. Here, the Fifth Circuit held such evidence supported the presumption unfavorable to the taxpayer, even though such unfavorable presumption is accounted for by a distressed financial condition—the taxpayer was unable to meet its payroll for months and could purchase only 50 per cent of a normal supply of sugarcane (R. 55).

With identical states of fact two different trial courts, one experienced and the other inexperienced, reach opposite results and the appellate Court affirms in each case. This is error requiring the exercise of the Supreme Court's jurisdiction to correct it.

4.

The Circuit Court of Appeals in this case (and *Webre Steib* and *Slack* filed this day) conflicts with the *FOURTH CIRCUIT* as to the relevancy of other evidence advanced by Caldwell upon a showing that the statutory margin periods are not comparable. Here The Tax Court found that the base period was "uncertain and confused" (R. 55); that Caldwell was unable to meet its payroll or buy sugarcane (R. 55); that immediately before the June 8, 1934 price rise the market had declined 60 cents (R. 56); and, that a computation based on the 1936 crop (the next succeeding one) would show that Caldwell bore the entire burden of the tax (R. 58, 62).

In *Epstein* v. *Helvering* (120 F. (2d) 427) the Fourth Circuit Court of Appeals excluded the post-tax period from a margin computation because conditions had changed, stating at page 430:

> "It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

The same Court in *Arkwright Mills* v. *Commissioner* (127 F. (2d) 465), held that a period after the tax that included the statutory post-tax period was proper rebuttal of the statutory margin. It stated at pages 467-8:

> "We understand the Board to hold that the evidence as to change in demand in the periods chosen by Congress for comparison should be ignored because the

evidence represents merely an attempt to show what the taxpayer's margin would have been during the tax period if there had been no tax; and because this effort involves the setting up of a hypothetical or imaginary situation which has no tendency to prove the actual extent to which the taxpayer bore the burden of the tax. This point of view in our opinion cannot be maintained. In the first place it is manifest that the statutory test, which Congress itself devised, involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax. * * * Clearly, this test assumes that all the factors except the tax which affect the margins are the same in both periods, for otherwise the comparison would not show whether the taxpayer bore the burden or not; and this assumption involves the very sort of hypothesis which the Board condemns. That this is true is recognized by high authority. See Statement of Secretary of Agriculture Wallace before Finance Committee on Title VII of the Revenue Act of 1936, Hearings before Committee on Finance, United States Senate, 74th Congress 2nd Session, on H. R. 12,395, p. 859; Ferger on Windfall Tax and Processing Tax Refund, American Economic Review, March, 1937, p. 52.

"Moreover, there is no novelty or vice in the hypothetical approach to the ascertainment of a person's rights or the extent of damage wrongfully imposed upon him. Valuation of property involves the ascertainment of a hypothetical selling price. Breach of contract often involves a hypothetical loss of profits. Personal injury often requires an estimate of earnings that would have been made had the injury not occurred. Frequently the investigation of these matters is of such difficulty that mathematical certainty in the determination of amounts is impossible; but rights are not lost thereby, and it becomes the duty of the courts to find the relevant facts and to base a reasoned judgment upon them. * * *."

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BRIEF IN SUPPORT OF PETITION.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the "prima facie evidence" and the "presumption" arising from the margin computations prescribed by Section 907 as controlling when substantial rebutting evidence is introduced compelling findings of fact that the periods are not comparable.

2. In holding that the experience of another period (1936) has no probative rebuttal value.

3. In failing to hold that evidence of prices being the same during the taxpayer's tax period marketing season as they were in the season immediately preceding the tax is relevant.

ARGUMENT.

Effect of the Presumption.

Congress itself indicated the weight and nature of the presumption in Subdivision (e) of Section 907, reading in part:

> "Either the claimant or the Commissioner may *rebut* the presumption established by Subsection (a) of this Section by proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax." (Italics supplied.)

Statutory presumptions, fundamentally, fall into one of three groups:

(1) An inference or assumption which must be drawn by the trier of facts from a given fact or set of facts with an operative effect only upon the burden of going forward with the production of evidence; when any rebutting evidence is produced the presumption is dissolved (the Court held the presumption to be of this type in *Commissioner* v. *Bain Peanut Co.* (134 F. (2d) 853) and in *Webre Steib Company Ltd.* v. *Commissioner* (140 Fed. (2d) 768) (Certiorari applied for this day) but failed to so hold in the instant case and in *Slack Bros. Inc.*—Certiorari applied for this day).

(2) An inference which must be drawn but which places upon the opponent the burden of persuading the trier that the presumed fact does not exist; i.e., the presumption shifts the burden of persuasion, i.e., of proof; and

(3) An inference which must be drawn and must be used by the trier with the evidence; it may have an effect upon the burden of producing evidence, but the satisfaction of the burden does not totally destroy the presumption, for its effect as evidence remains.

It is submitted that the language used by Congress in Subdivision (e) indicates that it intended the presumption to have the effect of either (2) or (3). In the case of *Annis-*

ton Manufacturing Company v. *Davis*, 301 U. S. 337, 354, this Court did not construe Section 907 as did the Circuit Court of Appeals in the present case. The Supreme Court said (page 354):

> "But it cannot be said that the comparison set up between the results of operations during the 'tax period' and the 'period before or after the tax' are wholly irrelevant."

And again (page 355), this Court said:

> "The permissible, and we think the true, construction of Section 907 (e) is that the words '*actual* extent' are used in contradistinction to the *presumed* extent, according to the prima facie presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged under Section 907 (a) or otherwise."

Observe that the Court speaks of proof in *rebuttal* and evidence to *overcome* the presumption, not merely dissolving it by the production of some evidence.

It is suggested that the Court below missed the real distinction between the presumption upheld in the *Turnipseed* case and the one held to be invalid in the *Henderson* case; the real distinction being that in the former there was "some rational connection between the fact proved and the ultimate fact presumed"; whereas, in the latter case this reasonable connection was absent, the Court saying:

> "The mere fact of a collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone."

There is no constitutional inhibition against a presumption such as (2) and (3) above which may shift to the opponent the burden of persuasion or which remains in the case as evidence even after some rebutting evidence is produced. The real ground upon which the state statutory presumption was held invalid in the *Henderson* case was because it was unreasonable and arbitrary and denied the railway company a fair opportunity to repel it. This Court has already held in the *Anniston Manufacturing Company* case that the presumption here is not unreasonable or arbitrary.

In the case of *Heiner* v. *Donnan*, 285 U. S. 312, 329, this Court recognizes that a rebuttable presumption may have the effect of shifting the burden of proof.

It has been repeatedly held that statutory presumptions, admittedly constitutional, do affect the burden of proof and are to be considered as evidence. As an illustration, the Internal Revenue Act now in effect and those for several years back contain a provision with respect to estate taxes that any transfer of a material part of his property made by a decedent within two years prior to his death without consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death. This provision shifts to the taxpayer the burden of overcoming this presumption by satisfactory proof; and no Court has held that the presumption is unconstitutional or that it is dissolved merely upon the introduction of some proof of a rebuttable nature.

Shwab v. *Doyle*, 269 Fed. 321 (C. C. A. Sixth) (reversed on another point 258 U. S. 529), dealing with this statute, says (page 333):

> "The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. * * * Unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary,

> are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion."

Other cases to a similar effect are *Myers* v. *U. S.*, 2 Fed. Supp. 1000, 1006 (Court of Claims), Writ refused 292 U. S. 629; *Myers* v. *McGruder*, 15 Fed. Supp. 488, 496; *Land Title & Trust Company* v. *McCaughn*, 7 Fed. Supp. 742, 744.

In *James-Dickinson Farm Mortgage Company* v. *Harry*, 273 U. S. 119, the Court says (page 124):

> "It is well settled that a state may consider proof of one fact presumptive evidence of another, if there is a rational connection between them, and also that it may change the burden of proof."

Hawes v. *Georgia*, 258 U. S. 431, involved the prohibition laws of Georgia which provided that when any distilling apparatus is found upon the premises same shall be prima facie evidence that the person in possession of the premises had knowledge of the existence thereof. In a prosecution under this statute the burden of proof of course was on the state to show the defendant's guilt, but it was held that when proof of possession was furnished the burden then shifted to the defendant to show his lack of knowledge. The Court said:

> "The establishment of presumptions and of rules respecting the burden of proof, is clearly within the domain of the state governments, and a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law."

The Court below observed in the *Bain* case (*supra*) that "the law governing burden of proof is a matter of substance," citing *Central Vermont Railway Co.* v. *White*, 238 U. S. 507;

Granting that the law governing burden of proof is a matter of substance, we submit that to construe the presumption here as one shifting the burden of proof would

not result in changing the substantive law. The substantive law during the course of the hearing and at its end is the same as it was when the hearing began; the rule with respect to the statutory presumption was in effect before the hearing and remained the same throughout the hearing. In the case of *Central Vermont Ry. Co.* v. *White*, the Court was dealing with the question as to whether or not, in the particular case for personal injuries brought under a Federal statute but in a State court, the plaintiff had the burden of proving a lack of contributory negligence as required by the state rule or whether the burden was on the defendant to plead and prove the existence thereof as required by the practice in the Federal courts. The Court merely held that the rule with respect to the burden of proof was a matter of substance and not a matter of procedure, and therefore it would be assumed that Congress intended that the Federal rather than the State rule should prevail in all suits brought under the Federal Act.

Cited above in *Hawes* v. *Georgia*, wherein a statute was upheld which raised a presumption of guilty knowledge from proof of possession, and shifted to the defendant the burden of disproving such knowledge. Similarly, in *Yee Hem* v. *U. S.*, 268 U. S. 178, there was involved a prosecution for the offense of concealing smoking opium after importation with knowledge that it had been imported in violation of the Federal Act, the law providing, among other things, that "possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." The burden of course was on the prosecution to prove the guilt of the defendant beyond a reasonable doubt; but, possession having been proved, the burden shifted to the defendant to avoid conviction by producing satisfactory explanation of such possession. Although this presumption resulted in the shifting of the burden of proof, it was upheld, the Court saying (page 184):

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not arising under the statute."

That the burden of persuasion (i.e. of proof) may shift during trial as the result of a presumption is further illustrated in criminal prosecutions where defendant interposes a plea of insanity. The burden of proof is on the defendant to show that he was insane at the time of the criminal act. But this burden shifts if proof is made that at a prior date he had been adjudged insane; the presumption that such insane condition continued to exist after the date of its judicial determination then places on the prosecution the burden of proving that at the time of the commission of the offense the accused was sane. (*Witty* v. *State*, 171 S. W. 229).

To say that a particular presumption has the effect only of requiring the adversary to produce some proof in rebuttal and then disappears would, in the case of trials in the District Courts, have the effect of transferring jury functions to judges, as Mr. Justice Black points out in his dissenting opinion in *New York Life Insurance Company* v. *Gamer* (303 U. S. 161, 172), in that thereby the trial judge would be given the right to weigh the rebutting evidence and "decide when sufficient evidence has been introduced to take from the jury" the right to find in favor of the presumed fact even though the jury might disbelieve the rebutting evidence or give less weight thereto than does the trial judge.

Hence we urged that the Court below misconstrued the terms "prima facie evidence" and "presumption" as used in Section 907, both in the *Bain* and *Webre* cases as well as

in the instance and *Slack* cases; that the presumption remained only as evidence to be rebutted or overcome by proof "of the actual extent to which the claimant shifted to others the burden of the processing tax".

The Court Improperly Held That the 1936 Crop Experience Had No Probative Value.

Once The Tax Court made findings establishing the fact that the base period was not a period, comparable in every respect with the tax period—then, as stated in *Epstein* v. *Helvering* (120 Fed. (2d) 427) (4 C. C. A.):

> "It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

In the *Epstein* case the Court included the post-tax period and in *Arkwright Mills* v. *Commission* (127 F. (2d) 465) the Court included a period eighteen months after the statutory period in order to determine the actual extent of the burden borne.

Here Caldwell advanced the first crop year after the statutory base period. The Tax Court found that the quota system of control remained in effect. The period is therefore comparable with the tax period, and a computation of margins based on such period shows that Caldwell bore the entire burden of the tax.

Now, whether we call it a substitute period or rebuttal makes no difference—the fact remains that it demonstrates clearly that some other factor than the tax is responsible for the increased margin. Whether it be that the statutory margin period is subnormal and therefore shows a subnormal margin; or, whether it be that the quota control system created new conditions permitting larger margins, makes no difference—the fact remains that from the incep-

tion of the quota control and tax, margins were better and when the tax was dropped margins were still better. Is this not clear relevant evidence that some other factor than the tax was responsible for the improved margin?

Hence we submit that the 1936 crop experience is relevant and does establish the actual extent of the tax burden borne.

The Court Improperly Failed to Consider the Actual Selling Prices During the Marketing Season.

It is conceded by the litigants and the Courts that unless the tax was passed on in the selling price it was borne by Caldwell. There is no contention that it was passed back or otherwise recouped. Caldwell markets its sugar between October and the following January or February, at least to the extent of 80 to 97 per cent (R. 54, 72-73) of its production. If the prices during the tax period are no higher than they were during the preceding marketing season, is that not convincing evidence that the tax was borne by Caldwell? The Court should have found that fact. It was in evidence. It has been stipulated (R. 73).

Hence, we submit that Caldwell has shown that the actual extent to which it bore the burden of the tax is the full burden of the tax.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Sec. 902. CONDITIONS ON ALLOWANCE OF REFUND.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review, in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U. S. C. 1940 ed., Title 7, Sec. 644.)

Sec. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricul-

tural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (U. S. C. 1940 ed., Title 7, Sec. 645.)

Sec. 906. PROCEDURE ON CLAIMS FOR REFUND OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallawance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. * * *

* * * * * * * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926 as amended. (U. S. C. 1940 ed., Title 7, Sec. 648.)

Sec. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of

the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each

article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax-period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe

that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (U. S. C. 1940 ed., Title 7, Sec. 649.)

Section 510 (j) of Revenue Act of 1942:

(j) Section 906 (g) (relating to appeals) is amended to read as follows:

"(g) A decision of the Board rendered after January 1, 1942, may be reviewed by a circuit court of appeals or the United States Court of Appeals for the District of Columbia, if a petition for such review is filed by either the claimant or the Commissioner within three months after the decision is rendered. Such decision may be reviewed by the circuit court of appeals for the circuit in which the claimant resides, or has his principal place of business, or, if none, by the United States Court of Appeals for the District of Columbia: *Provided, however*, that in any event such decision may be reviewed by any circuit court of appeals or the United States Court of Appeals for the District of Columbia which may be designated by the Commissioner and the claimant by stipulation in writing. Such courts shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without demanding the cause for a rehearing as justice may require. The judgments of such courts shall be final, subject to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code as amended. Such courts are authorized to adopt rules for the filing of petitions for review, preparation of the record for review, and the conduct of the proceedings on review. A decision of the Board rendered after January 1, 1943 shall become final in the same manner that decisions of the Board become final under section 1140 of the Internal Revenue Code."

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No. 149

In the Supreme Court of the United States

OCTOBER TERM, 1944

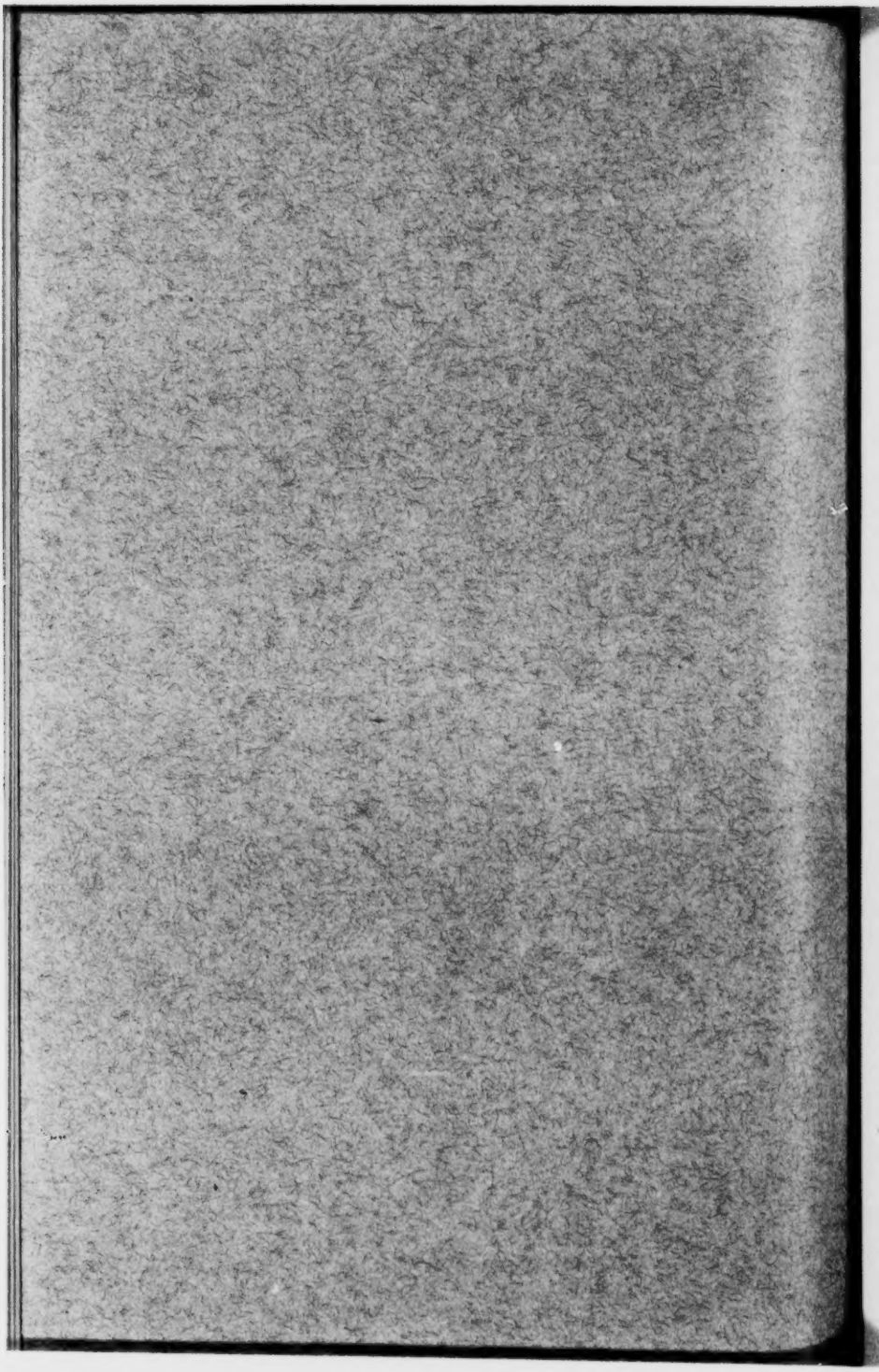
CALDWELL SUGARS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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OPINIONS BELOW

The findings of fact and opinion of the Tax Court of the United States (R. 52–62) are reported at 2 T. C. 105. The opinion of the Circuit Court of Appeals (R. 80–82) is reported at 140 F. 2d 772.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1944 (R. 82). A petition for rehearing was denied March 13, 1944 (R. 86). A petition for a writ of certiorari was filed June 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, as both courts below found, the taxpayer failed to prove, in the manner required by Section 902 of the Revenue Act of 1936, that it bore the burden of all or any part of the processing tax which it paid and which it sought to recover.

2. Whether it was error not to permit the substitution of a calculation of the taxpayer's "margin" upon the processed commodity during the 1936 crop months for a calculation covering the post-tax period prescribed in the Act.

STATUTES INVOLVED

The material provisions of the statutes involved are set forth in the appendix to the brief in opposition simultaneously filed in the companion case of *Webre Steib Company, Ltd.* v. *Commissioner of Internal Revenue,* No. 148.

STATEMENT

This proceeding involves a claim for refund of amounts paid as processing tax under provisions of the Agricultural Adjustment Act which were held unconstitutional in *United States* v. *Butler,* 297 U. S. 1. The taxpayer filed a claim for refund of $29,567.58 (R. 11–22) which was denied in full by the Commissioner of Internal Revenue on September 30, 1941 (R. 9–10). On December 23, 1941, the taxpayer filed a petition with the Proc-

essing Tax Board of Review[1] for review of the Commissioner's disallowance of its claim (R. 4–9).[2] The proceeding was tried on the merits before the Processing Tax Board of Review (R. 2), but had not been decided by that Board before it was abolished and the case transferred to the Tax Court. The case was submitted to the Tax Court on the record made before the Processing Tax Board (R. 3), and on the basis of that record the Tax Court made its findings of fact and held that the taxpayer had failed to prove that it was entitled to a refund of any part of the amount involved (R. 52–62). The Circuit Court of Appeals affirmed (R. 80–82).

Section 902 of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (Brief in No. 148, Appndix, pp. 15–16), provides that the taxpayer may not recover any sum unless he establishes that he has borne the ultimate economic burden of the tax to the extent of the amount awarded and has not shifted it by charging higher prices or paying lower prices for unprocessed material or in any other manner. As a means of determining the incidence of processing

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[1] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as of the close of business on December 31, 1942, and its jurisdiction and functions were transferred to the Tax Court of the United States.

[2] The Tax Court found that the taxpayer paid taxes in the amount of $28,663.55 (R. 52, 58), but the amount of refund now claimed is only $25,926.43 (R. 59).

taxes sought to be recovered, the Act further provides in Section 907 (Brief in No. 148, Appendix, pp. 16–20) that the extent of the reduction, if any, in the average margin of receipts of the processor over cost of raw materials plus processing taxes, per unit of the commodity processed during the period the taxes were paid, as compared with the average margin of receipts over raw material costs during the 24 months preceding and the 6 months immediately following the period the statute was in effect, shall be "prima-facie evidence" of the extent to which the processor bore the burden of the tax; but "either the claimant or the Commissioner may rebut the presumption" so established "by proof of the actual extent to which the claimant shifted" the burden to others, including, "but * * * not * * * limited to— * * * proof that the difference or lack of difference" between the margin averages was due to other factors and "proof" that the processor modified its contracts of sale "or adopted a new form of contract of sale, to reflect the initiation * * * of the processing tax, or * * * changed the sale price of the article * * * by substantially the amount of the tax * * *, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax * * *; but the claimant may establish that such acts were caused by factors other than the processing tax,

or that they do not represent his practice at other times."

The taxpayer is a Louisiana corporation with its principal place of business in that State. It was engaged at all material times in growing and buying sugarcane and processing it into raw sugar, refined sugar, and blackstrap molasses. It produced about 35 percent of the sugarcane which it processed and purchased about 65 percent from other growers. The taxpayer sold its products through a brokerage firm in New Orleans, except for about one percent of sales, which were made to customers located near the factory. The taxpayer's refined sugar was of an inferior grade and was sold at a differential of 20 cents to 45 cents a hundred pounds below the current price quoted by the American Sugar Refining Company. (R. 53–54.)

From the early spring of 1933 to June, 1934, conditions in the sugar industry were uncertain and confused and the taxpayer was in financial difficulties. The price of raw sugar declined, with a slight interruption in February, from a high of $3.65 per 100 pounds to $2.80 about June 1, 1934, and the price of refined sugar declined from a high of $4.70 to $4.10. (R. 55–56.) The processing tax of 53½ cents per 100 pounds on refined sugar became effective June 8, 1934. The general price level of refined sugar was increased by 55 cents on that date. (R. 57.)

The taxpayer's statutory tax period began June 8, 1934, and ended April 30, 1935. Its average margin per unit of commodity processed during the tax period was $.01186 per pound. Its average margin per unit of commodity processed during the statutory period before and after the tax was $.011538 per pound. (R. 57.) Hence its margin was higher during the period the tax was paid than during the comparative period and a presumption arose that it had not absorbed any part of the tax. The taxpayer did not, however, actually process any sugar during the six months following the period the tax was effective.

The average margin per unit of commondity processed by the taxpayer from its 1936 crop of sugar cane during the months from October, 1936, to January, 1937, inclusive, was $.017961 per pound, computed in the same manner as the margins during the statutory periods (R. 58). This margin was higher than that during the tax period.

The taxpayer paid $28,663.55 as processing taxes. No part of this amount has been refunded. (R. 58.)

The processing tax was not billed as a separate item on the taxpayer's invoices to customers, except on seven invoices upon which $2,737.12 of taxes were billed as a separate charge. There was no agreement expressly relieving the taxpayer of the burden of the tax or reimbursing it therefor. (R. 58.)

The Tax Court concluded (R. 60) that the taxpayer failed to overcome the prima facie effect of the margin evidence and failed to prove that it bore the burden of the processing tax. The Circuit Court of Appeals affirmed (R. 82).

ARGUMENT

I

In this case the presumption arising from the margin evidence was reinforced by evidence relating to at least two of the pertinent factors enumerated in Section 907 (e) of the statute (Brief in No. 148, Appendix, pp. 19–20). The general price level of sugar was increased by the amount of the tax as of the date the tax was imposed (R. 57), and it was shown that the taxpayer followed the competitive price level, selling at a small discount (R. 54). On invoices representing 575,700 pounds of sugar processed and sold by the taxpayer during the tax period, the processing tax was admittedly billed as a separate item (R. 58), and the Tax Court was unable to find that these sales were exceptional rather than typical (R. 60).

There is no basis in the findings for any other result in the court below than an affirmance of the Tax Court's decision, unless it be thought that adverse conditions in the sugar industry prior to the effective date of the processing tax (*supra*, p. 5) compelled a contrary conclusion as a matter of law.

Clearly this is not the case. *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780. Indeed, as against the specific facts found, it would have been erroneous for the Tax Court to give effect to allegedly countervailing factors of a general nature. *United States* v. *H. T. Poindexter & Sons Mer. Co.,* 128 F. 2d 992 (C. C. A. 8th), certiorari denied, 317 U. S. 677, rehearing denied, 317 U. S. 710. See also *Williams* v. *United States,* 48 F. Supp. 647 (C. Cls.), certiorari denied, 320 U. S. 750, in which similar contentions were made by the taxpayer. The burden of proof is upon the taxpayer throughout, and it is admittedly onerous. *Colonial Milling Co.* v. *Commissioner, supra; Standard Knitting Mills* v. *Commissioner,* 141 F. 2d 195 (C. C. A. 6th), certiorari denied, May 29, 1944; *Finck Cigar Co.* v. *Commissioner,* 134 F. 2d 261 (C. C. A. 5th), certiorari denied, 320 U. S. 736.

The decision below is not in conflict with *Helvering* v. *Insular Sugar Refining Corp.,* 141 F. 2d 713 (App. D. C.), as asserted by the petitioner (Pet. 7). Although the cases arose in the same industry and the facts relating to conditions in the industry were the same, clearly the specific facts were not identical and the posture of the parties both before the trial tribunal and on appeal was different. In the *Insular Sugar Refining Corp.* case the Government rather than the taxpayer had the burden of overcoming the presump-

tion based upon the margin evidence and the court, which accepted the Board's findings, agreed that the presumption had not been overcome. The instant case is very different. The presumption was adverse to the taxpayer, increasing the burden of proof which rested upon him. The court below simply sustained the conclusion of the Tax Court that it was impossible to say, from the evidence submitted, that the presumption was wrong. To the contrary, the inference was that the *actual* fact coincided with the *presumed* fact.[3]

II

The taxpayer was properly denied the right to go outside the periods fixed by Congress in computing the comparative margins prescribed by the statute as prima facie evidence. As pointed out in the brief in opposition simultaneously filed in *Webre Steib Company, Ltd.* v. *Commissioner of Internal Revenue,* No. 148, to which reference is here made, the cases of *Epstein* v. *Helvering,* 120 F. 2d 427 (C. C. A. 4th), and *Arkwright Mills* v. *Commissioner,* 127 F. 2d 465 (C. C. A. 4th), furnish no basis for a contrary conclusion, which is not permitted by the statute.

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[3] This case and *Slack Bros., Inc.* v. *Commissioner of Internal Revenue*, No. 150, are to be distinguished from *Webre Steib Company, Ltd.* v. *Commissioner of Internal Revenue*, No. 148, where the presumption was fully overcome by evidence of certain rebuttal factors enumerated in the statute, which established that the *actual* fact was at variance with the *presumed* fact.

CONCLUSION

There is no conflict of authorities. The decision below is correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 149.

CALDWELL SUGARS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Caldwell Sugars, Inc., a Louisiana corporation, respectfully prays that this Court reconsider its denial of a writ of certiorari in this cause and gives as reasons therefore:

THAT, this Court granted certiorari, decided and remanded *Webre Steib Company, Ltd.* (65 Sup. Ct. 578) on February 12, 1945; and the rules laid down for the guidance of the lower Court in that case are equally applicable to the instant case but the decision of the Court below is not in accord with such rules; insofar as

The Court below decided the cause on the basis of the margins—which in this case was adverse to the taxpayer—despite the rebuttal of such margins; and

The Court below failed to weigh the evidence contained in the findings of fact; and

The Court below failed to give any consideration to the 1936 crop experience; and

THAT the decision of the Court below is not sustainable in law as the law has been determined by this Court; and, as set forth in detail in the accompanying Brief;

WHEREFORE, it is prayed that this Petition for Rehearing be granted and a writ of certiorari issue.

C. J. BATTER,
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The foregoing Petition for Rehearing and the following Brief are presented for the consideration of this Court in good faith and in the firm belief of Counsel that equal justice under law requires a remand of the cause. This Petition is not filed for purposes of delay.

C. J. BATTER.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 149.

CALDWELL SUGARS, INC., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

INTRODUCTION.

The instant case, *Webre Steib Company, Ltd.* (Docket No. 148) and *Slack Bros., Inc.* (Docket No. 150) are companion cases. All three taxpayers are growers and processors of sugar cane, and all are seasonal operators. The cases were tried in the same manner before the Processing Tax Board, and the same Counsel appeared for both parties in each case. The Processing Tax Board decided *Webre Steib* and The Tax Court denied rehearing. The Tax Court decided the instant case and *Slack Bros., Inc.* from the record made before the Processing Tax Board. The findings of fact differ only slightly, the primary difference being that in the case of *Webre Steib* the margin was favorable to the petitioner, whereas in the instant

case and *Slack Bros., Inc.* the margin was unfavorable due to special circumstances set forth in the findings.

The Fifth Circuit Court of Appeals heard all three cases on the one day and decided all three cases on February 15, 1944. To the extent that the Courts below applied the law improperly in *Webre Steib,* sufficient to cause a remand by this Court, it would seem such Courts erred in like manner in the instant case and *Slack Bros., Inc.* It is not reasonable to suppose that the Courts below applied the law correctly in this case and *Slack Bros., Inc.* and applied it incorrectly in *Webre Steib Company, Ltd.*

In all three cases writs of certiorari were applied for on the same day; that is, June 12, 1944. This Court granted certiorari in *Webre Steib* on October 9, 1944 and failed to act on the instant case and *Slack Bros., Inc.* The impression created was that if the taxpayer were successful in *Webre Steib,* certiorari and remand would follow as a matter of course in this case and *Slack Bros., Inc.*

The taxpayer was successful in *Webre Steib* and three weeks later certiorari was denied in the case at bar and *Slack Bros., Inc.*

The case at bar does not lend itself to being distinguished from the holdings of this Court in *Webre Steib Company, Ltd.*—rather, comparison is in order. In this Brief, we, therefore, address ourselves to applying the holdings of the Court in *Webre Steib* to the case at bar, to the end and purpose of satisfying the Court that the granting of a writ and a remand are merited.

THE WAY IN WHICH THE CASE HAS BEEN TRIED.

The *Webre Steib* case was a case of first impression to this Court. The meaning of the ambiguous and complex statute had not been determined. Numerous Courts and Counsel have labored in an effort to ascertain the rights of the parties. Results differed, and finally in *Webre Steib* this Court determined the law, remanded the case, and directed The Tax Court to take:

> "such further evidence as that court may think it proper to receive in view of the way in which the case has been tried." (65 Sup. Ct. 583)

The foregoing instruction followed an observation by the Court that:

> "The fact may be that neither side's evidence goes very far toward demonstrating where the burden of the tax fell" citing Johnson, AAA Refunds: A Study in Tax Incidence (1937) 37 Col. L. Rev. 910.

Johnson's article points out the economic features of tax shift, the effect of supply and demand, marginal operators, etc. All three cases, the case at bar, *Webre Steib* and *Slack* were tried on the same theory, but the Court below took no cognizance of this type of evidence. In the case of sugar, the published reports of the Department of Agriculture resolve the Johnson test in favor of the taxpayer (CF. Press Release, Secretary of Agriculture pp. 79-81 of Brief for Petitioner in Webre Steib Company, Ltd. Docket No. 148). Now, because of the remand such evidence will be weighed in *Webre Steib*, whereas, unless certiorari is granted and remand ordered in the case at bar, your petitioner will be denied an equal opportunity to avail of similar evidence.

We sincerely believe that on this ground alone, certiorari should be granted and the cause remanded.

WEIGHING THE EVIDENCE.

In *Webre Steib* this Court ordered the cause remanded because the trial Court decided the case on the presumption which had been rebutted instead of weighing the evidence. We think this fact equally true in the case at bar. The Tax Court states: (R. 60)

> "During the tax period it was not economically impossible for the claimant to shift the tax burden to its customers, for it did this, as it admits, as to $2.737.12 by adding this tax to the price as a separate item. Logically it is reasonable to suppose that the claimant

> probably was also able to pass on the remaining tax to its other customers. At least we can reach no assured conclusion that it did not, or that the sales involving $2,737.12 were exceptional rather than typical. The claimant has failed to overcome the prima facie effect of the unfavorable comparisons of the margins and has failed to prove that it bore the burden of the tax and did not shift it by any means whatever to those to whom it sold its products."

The foregoing basis for the decision of The Tax Court is not sustainable in law. It disregards the evidence. It is contrary to the findings of fact made by The Tax Court. The evidence was sufficient to rebut the presumption but The Tax Court disregarded such evidence and decided the case on the presumption instead of weighing the evidence.

Rebuttal of presumption: The findings of fact made by The Tax Court clearly establish that the presumption was rebutted, but The Tax Court ignored such findings and held that the passing on of $2,737.12 of tax was indicative of the passing on of the entire tax.

The Tax Court in its opinion states with regard to the $2,737.12 of tax passed on: (R. 60)

> "At least we can reach no assured conclusion that it did not, or that the sales involving the $2,737.12 were exceptional rather than typical"

but in its finding of facts, The Tax Court states: (R. 58)

> "The processing tax was not billed as a separate item on claimant's invoices to customers covering its products sold, except on seven invoices, upon which the processing tax in the aggregate amount of $2,737.12 was billed as a separate charge on a total of 575,700 pounds of second raw sugar made from magma.

The Tax Court also found as a fact: (R. 58)

> "the units of commodity processed by the claimant during the tax period was 8,988,103 pounds, consisting of x x x x and 554,036 pounds, or 6.2 percent of magma: out of which second and third grade sugar was made."

The tax was passed on only on the magma, or second sugars, and it is self-evident that magma comprising 6.2 per cent of the commodity processed is exceptional and not typical. The whole premise of The Tax Court's decision falls when the evidence pertaining to the $2,737.12 is weighed.

The Tax Court further states: (R. 60)

> "Logically it is reasonable to suppose that the claimant probably was also able to pass on the remaining tax to its other customers."

If the evidence had been weighed there would be no basis for that statement because the major premise on which it rests is false. The $2,737.12 was exceptional (second sugars made from magma) and not typical.

What is the evidence that was not weighed and that rebuts the margin presumption? The findings of fact disclose:

That in 1933 the claimant was unable to meet its payrolls for four months; that its land was in poor condition; and that due to loss of confidence in the claimant's ability to pay, it was only able to buy 33,226 tons of sugar compared to 66,153 tons of sugar the year before (R. 55). Such conditions are bound to be reflected in increased costs for grown and purchased cane and decrease the margin for the base period—resulting in the unfavorable margin in the tax period;

In 1933 there was an oversupply of sugar (R. 55); prices were at low ebb; during a period when the claimant did no processing (R. 53) prices advanced from $2.80 to $3.65 (R. 56); as the claimant again entered the market, October 1933, the beetsugar crop which produced 300,000 tons more sugar than had been produced in any year before 1933 came upon the market (R. 56); prices declined from $3.65 to $2.80 (R. 56); and there was at least 50 percent more sugar available than could be consumed in a year (R. 56).

The sales price in 1934 was about the same as during the year before the tax (R. 73). This is important because the Respondent argues and the Court finds that the tax was passed on in the selling price—not back (R. 60).

We believe the rationale of this Court's opinion in *Webre Steib* requires a holding that the presumption is inoperative. In any event, it is clear from the holding of The Tax Court quoted above that its holding that the presumption was not rebutted rested on an erroneous conception of the billing of $2,737.12 of tax on second sugar instead of a weighing of the evidence as contained in its findings of fact.

1936 CROP EXPERIENCE.

In the *Webre Steib* case this Court held that: (65 Sup. Ct. 583-4)

> "The 1936 experience, though it could not help petitioner to create a favorable presumption, was entitled to be given whatever probative value it might independently have had and, subject to the usual principles of admissibility, was therefore admissible."

The Tax Court excluded the 1936 crop from consideration (R. 62). The 1936 crop experience, considering the fact that due to the continuation of the quota system the factors were the same during the tax period (R. 57), and further taking into account the finding of The Tax Court that the 1936 crop experience shows a complete absorption of the tax (R. 58), makes that evidence and the failure to weigh it sufficient to change the outcome, and a fortiori reason for granting the writ and remanding.

ACTUAL EXTENT OF TAX BURDEN BORNE.

This Court in the *Webre Steib* remand instructed The Tax Court to take such further evidence as it may think proper in view of the way in which the case was tried. This instruction was based on the economic incidence of the tax citing *Johnson, AAA Refunds* (supra)

The claimant, in the case at bar, introduced in evidence reports of the Department of Agriculture that resolve that factor in favor of the taxpayer, concluding that the quota system eliminated the ordinary and usual economic effects. The opinion of The Tax Court (R. 61) brushes aside that evidence on the premise that the claimant did not sell to the ultimate consumer. The findings of fact show that all but one percent of the sugar was sold to wholesale grocery houses, chain stores, candy manufacturers, and bakeries (R. 54). The conclusion of the Court is not supported by the findings of fact. The evidence of the claimant, that is, the Department reports and the 1936 crop experience, were directed to show that the quota system was the price controlling factor.

The Tax Court in its opinion states: (R. 61)

> "The quota system remained in effect after the invalidation of the tax and the prospect of the application of a quota system had a stimulating effect on prices prior to the enactment of the sugar amendment, so that the increase may have been to some extent due to the tax."

This conclusion is erroneous in part, and not sustainable in law. The findings of fact disclose that on June 1, 1934, a week before the effective date of the tax, the price had declined to $4.10 from a high of $4.70 (R. 56). There is nothing stimulating about a decline of 60 cents—so that the premise for that conclusion is wrong. The ultimate conclusion that the price rise of June 8th "may have been to some extent due to the tax" is necessarily wrong. It was due to the quota as the 1936 crop experience shows.

However, assuming the premise of The Tax Court that the increase "may have been to some extent due to the tax", then is not the claimant—in the absence of other evidence indicating a tax shift—entitled to a refund of such part of the tax as was not included in that price rise? It was the duty of The Tax Court to measure the part not so shifted and order a refund to that extent.

The fact is that upon a weighing of all the evidence—that is, the Government's admissions through the publications of the Department of Agriculture (Cf pp. 79-81 Petitioner's Brief in Webre Steib); the 1936 crop experience, a period when quotas were in effect (R. 57, 58); the fact that the amount realized was not based on the sales price but on the action of the market following the sale (R. 54, 55); and, that sugar was sold on "so-called market move[s]", that is, claimants customers could satisfy their needs before an advance in price (R. 54)—the conclusion is inevitable that the tax was not shifted, and, any decision to the contrary is not sustainable in law.

CONCLUSION.

WHEREFORE, it is prayed that this Court will rehear its denial of a writ of certiorari, grant the same, and order the cause remanded to The Tax Court on the authority of *Webre Steib Company, Ltd.*

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